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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 457...

ROBERT H. POLK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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INDEX.

Page

Petition for writ of certiorari..... 1–8
Summary statement of matters involved..... 1
Reasons relied on for the allowance of the writ.... 7
Prayer for writ 8
Brief in support of petition for writ of certiorari....9–50
Jurisdiction 9
Statement of the case..... 11
Evidence on motions for new trial..... 26
Specification of errors 27
Argument 29
Summary of argument..... 29
Point A: Sufficiency of evidence (ques. 1)..... 31
Point B: Charge of Court and refusal of special request (ques. 2 and 3)..... 37
Point C: Testimony of Mrs. Skinner and Mrs. Tomlin (ques. 4) 41
Point D: Testimony of Lizzie Griggs and sixteen others (ques. 5)..... 47
Point E: Denial of new trial on newly discovered evidence (ques. 6)..... 48
Conclusion 49

Cases Cited.

Boyd v. U. S., 142 U. S. 450, 35 L. Ed. 1077...10, 42, 43, 51
Coulston v. U. S., 51 Fed. (2d) 178.....41, 50
Fasulo v. U. S., 272 U. S. 626, 71 L. Ed. 443..... 33
Fish v. U. S. (C. C. A. 1st), 215 F. 544, L. R. A. 1915A, 809 42

Goldsby v. U. S., 160 U. S. 70, 40 L. Ed. 343..... 41

Haley v. State, 84 Tex. Crim. Rep. 629, 209 S. W. 675.. 43
Hall v. U. S., 150 U. S. 76, 37 L. Ed. 1003.....42, 43
Hanover Fire Ins. Co. v. Dallavo, 274 Fed. 258 (6 C. C. A.) 41
Hendrey v. U. S., 233 Fed. 5..... 37
Hoffman v. U. S., 68 Fed. (2d) 101..... 41

Marron v. U. S., 8 Fed. (2d) 251..... 41
Martin v. U. S., 17 Fed. (2d) 973..... 48
McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819..... 10

Pelton v. State, 60 Tex. Crim. Rep. 412, 132 S. W. 480, Ann. Cas. 1912 C, 86..... 43
Pettine v. Territory of New Mexico, 201 Fed. 489.... 48
Power v. State, 117 Tenn. 363..... 41

Ramsey v. U. S., 268 Fed. 825..... 48

Schmeller v. U. S., 42 Fed. (2d) 544 (6 CCA)..... 37

Teese v. Huntingdon, 23 How. 2, 16 U. S. (L. Ed.) 479 43

U. S. v. Chase, 135 U. S. 255, 34 L. Ed. 117..... 33
U. S. v. Gradwell, 243 U. S. 476, 61 L. Ed. 857..... 33
U. S. v. Resnick, 299 U. S. 208, 81 L. Ed. 127..... 33
U. S. v. Sager, 49 Fed. (2d) 725..... 41
U. S. v. Wiltberger, 5 Wheat. 77, 5 L. Ed. 27.....7, 33

Weil v. U. S., 2 Fed. (2d) 145.....41, 43, 46
Welty v. U. S., 2 Fed. (2d) 562.....7, 37, 40
Wiborg v. U. S., 163 U. S. 632, 41 L. Ed. 289..... 31
Wrather v. State, 179 Tenn. 666, 169 S. W. (2d) 854.. 43

Statutes Cited.

20 Am. Jur. (Evidence), Sec. 309..... 43
20 Am. Jur. (Evidence), Sec. 318.....42, 43
Annotation: 3 A. L. R. 784..... 43
Cyc. Fed. Procedure (2d Ed.), Vol. 9, Sec. 4418, p. 532 37

Cyc. Fed. Procedure (2d Ed.), Vol. 9, Sec. 4332, pp. 456-457 31
Jones' Commentaries on Evidence, Vol. 6 (2d Ed.), Sec. 2399, pp. 4726, 4727..... 42
28 Ruling Case Law, Sec. 211, p. 623..... 43

Other Authorities Cited.

Servicemen's Dependents Allowance Act of 1942, C. 443, Title 1, Sec. 119, 56 Stat. 385.....1, 2, 32
United States Code, Annotated, Title 28, Sec. 347, Judicial Code, Sec. 240, as amended..... 9
War Risk Insurance Act, Sec. 13..... 37

SUPREME COURT OF THE UNITED STATES.

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

(1) The first, second, and third counts of the indictment in this case charged the petitioner and appellant below with the violation of C. 443, Title 1, Sec. 119, 56 Stat. 385, known as the Servicemen's Dependents Allowance Act of

1942, which became effective June 28, 1942, and provided as follows:

> "No part of any amount paid pursuant to the provisions of this title shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with any family allowance payable under this title, and the same shall be unlawful, any contract to the contrary notwithstanding."

Petitioner was found guilty under all three counts of the indictment and was fined $500.00 under each of the said counts.

The fourth count of the indictment in this case charged petitioner with a violation of C. 281, Sec. 11, 57 Stat. 580, as amended October 26, 1943, cited as Sec. 219, Title 37, U. S. C. A. (Accumulative Part), page 47, which provided as follows:

> "Any person who shall, directly or indirectly, solicit, contract for, charge or receive or shall attempt to solicit, contract for, charge, or receive any fee or compensation for assisting in any manner an enlisted man or dependent in obtaining a family allowance payable under this chapter, shall, upon conviction thereof, be guilty of a misdemeanor . . ."

The first question involved is:

Whether or not there is any competent and substantial evidence relating to the II, III and IV counts of the indictment, that petitioner solicited, charged, or received any sum as a fee for assisting in obtaining an allowance under the provisions of the Servicemen's Dependents Allowance Act?

(2) The District Court instructed the jury as follows:

> "That means, gentlemen, that even if a person had made a contract with a lawyer or with anyone else to pay a part of any allowance that was granted by the

Government under this Act, that it would be unlawful notwithstanding said contract, notwithstanding the fact that the person who received the allowance had agreed to pay it. **The Act makes it unlawful for any person to be paid any part of the amount, or for any part of the amount to be delivered to any person or to be received by any person, regardless of any agreement that they might have had about it.**

"Now, **before you could find the defendant guilty** under these three counts of the indictment, the first three counts, **you would have to find that the money alleged to have been received in those counts by the defendant was a part of an amount paid by the Government** pursuant to the provisions of the Servicemen's Dependents Allowance Act, **or** that the amount was delivered to or received by the defendant on account of services rendered in connection with the family allowance payable to these parties, and, of course, under the Act and under the indictment, you would have to find from the evidence, beyond a reasonable doubt, that the defendant did receive these amounts as specified and that they came from the allowance that was granted by the Government in these cases, and that it was received in connection with or on account of services rendered" (R. 236-237).

The second question involved is:

Whether or not the trial court erred in instructing the jury that the petitioner, under counts two, three, and four of the indictment would be guilty of the offense charged if he received any part of the allowance checks from the United States Government payable to Ellen Beard King, without stating that such reception, to constitute the offense charged, would have to be received on account of certain services rendered in connection with the allotment?

(3) Petitioner made a special request for additional instructions as follows:

"Gentlemen of the Jury: If you should find from the evidence that the defendant did not directly or

indirectly solicit, contract for, charge or receive any fee or compensation for assisting Ellen Beard King in obtaining an allowance under the Service Men's Dependency Act, you should return a verdict of not guilty under the second, third and fourth counts of the indictment; and you should return such a verdict regardless of whether or not you believe the evidence shows him guilty of having defrauded the recipient of the allowances of money which she had received from the Government.

"The defendant is not on trial for larceny from Ellen Beard King or for embezzlement or fraudulent breach of trust. Therefore even if he did cheat and defraud Ellen Beard King of money, he would not be guilty under the second, third and fourth counts of this indictment unless he received money from her as a charge or compensation for aiding her in obtaining the allowance. He is not on trial here for anything other than receiving money as a fee or compensation for obtaining the Government allowance, and even if he is guilty of larceny by trick, embezzlement or fraudulent breach of trust, in taking money to which she was entitled, that would not warrant his conviction under this indictment unless such money was taken or claimed as a fee or compensation for his services" (Defendant's request for additional instructions and denial by trial Court. R. 11).

The third question involved is:

Whether or not the District Court erred in refusing to instruct the jury as requested above?

(4) The trial court, over the objection of petitioner, permitted the reception of testimony that petitioner had committed other crimes other than that for which petitioner was indicated, in that the Court permitted Mrs. O. B. Skinner and Mrs. Thelma Tomlin to testify in substance as follows: That petitioner had assisted them in making applications for allotments, that allotments were

obtained for them, and that they paid him a fee for such services (R. 202-211).

The fourth question involved is:

Whether or not the trial court erred in receiving evidence of other crimes?

(5) The Government introduced evidence to show that it was petitioner's custom to charge a fee for filling out allotment papers and that he customarily charged one-third of the recovery (R. 40). Petitioner then offered the witness Mrs. Lizzie Griggs to show that he had not made any charge in obtaining an allotment for her and also offered the testimony of sixteen other witnesses whose testimony would have been similar to that of Mrs. Griggs (R. 136, 266-269).

The fifth question involved is:

Whether or not the trial court erred in sustaining the objection of the District Attorney to the testimony of petitioner's witness Mrs. Lizzie Griggs that petitioner had not made any charge in obtaining an allotment for her and whether or not the court erred in ruling that petitioner could not offer any of the sixteen other witnesses?

(6) Subsequent to the trial petitioner made a motion for a new trial on the ground of newly discovered evidence, which evidence established that, according to the records of the Office of Dependency Benefits, Newark, New Jersey, Mrs. O. B. Skinner had not at any time applied for a family allowance as she testified and for which she said the petitioner was paid a fee (Test. O. B. Skinner, R. 202-211; amendment to motion for new trial and exhibit thereto, R. 19-21). Shortly after petitioner perfected his appeal to the United States Circuit Court of Appeals for the Sixth Circuit he made a motion to remand the case to

the District Court in order that the trial court might entertain a motion for a new trial on the ground of newly discovered evidence. The newly discovered evidence was stated in affidavits and filed as exhibits to the motion to remand (R. 280). The motion was sustained and the case was remanded to the District Court, whereupon petitioner filed a motion for a new trial (R. 282). The motion for a new trial was overruled by the District Court and the record was returned to the United States Circuit Court of Appeals for the Sixth Circuit, whereupon petitioner filed an amendment to his Assignments of Error (R. 324).

The sixth question involved is:

Whether or not the trial court erred in failing to grant petitioner a new trial upon the ground of newly discovered evidence presented to and received by the court, to wit:

(A) The Certificate of Brigadier General L. H. Sims, United States Army, Director of Army Services Forces, in substance, showing that Mrs. O. B. Skinner had not at any time applied for a family allowance as she testified and for which she said petitioner was paid a fee (R. 19-21, 202-211).

(B) The certificate of L. H. Sims, Colonel, Director of the Office of Dependent's Benefits, Newark, New Jersey, in substance, showing that Mrs. Thelma Tomlin had not at any time applied for family allowance as she testified and for which she said petitioner was paid a fee (R. 280).

(C) The affidavit of Jasper King, dated February 20, 1946, and the testimony of Jasper King on the hearing for new trial on January 20, 1947, and the testimony of Noble King introduced at the hearing on January 20, 1947, which in substance established that the material evidence given at the trial by the witness Ellen Beard King was perjured (R. 281).

(D) The statement of Jesse Poteete, which was filed with the trial court on January 20, 1947, and the affi-

davit of Mary S. Ashworth, Circuit Court Clerk of Williamson County, Tennessee, which was filed with the trial court on January 20, 1947, which constituted evidence or an offer to produce evidence to show that petitioner represented Mrs. Tomlin in other matters than that testified by Mrs. Tomlin and which was evidence to show that Mrs. Tomlin did not obtain a certified copy of the divorce decree and pay for the same from Mrs. Ashworth, as Mrs. Tomlin had testified at the trial of the case (R. 7).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) This case involves a question of gravity and general importance because petitioner is being deprived of his liberty without being afforded the benefit of the rules prescribed by law for the trial of individuals charged with crime and is, therefore, being denied his constitutional right of having a fair and impartial trial.

(2) The United States Circuit Court of Appeals for the Sixth Circuit permitted the United States District Court for the Middle District of Tennessee so far to depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(3) The decision of this case necessarily involves the construction of the Servicemen's Dependents Allowance Act, and the pertinent rules of construction as stated in the case of U. S. v. Wiltberger, 5 Wheat. 77, 5 L. Ed. 37, and the case of Welty v. U. S., 2 Fed. (2d) 562, were not followed in the case at bar by the District Court and the United States Circuit Court of Appeals for the Sixth Circuit.

(4) The United States Circuit Court of Appeals for the Sixth Circuit by affirming the action of the District Court failed or refused to adhere to applicable decisions of this Honorable Court and its own decisions pertaining to evidence of other crimes as substantive proof of a defendant's guilt.

Wherefore, your petitioner prays that the writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and to send to this Court a full and complete transcript of the record and of the proceedings of the United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 10258, Robert H. Polk, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by the Court, and have such further relief as to this Court may seem proper.

Dated November 18, 1947.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. .....

ROBERT H. POLK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

(1) Petitioner was convicted of a criminal offense in a United States District Court; the judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit and under United States Code, Annotated, Title 28, Sec. 347, Judicial Code, Sec. 240, as amended, the only method to review the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit is by petition to this Court for the writ of certiorari.

Note: All typographical emphasis in this brief is that of petitioner unless otherwise indicated.

(2) The date of the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit to be reviewed is October 27, 1947, and this petition has been filed within the time provided by statute (R. 327).

(3) Petitioner was tried and convicted upon incompetent and prejudicial evidence, and the trial court refused to instruct the jury as to the sound interpretation of the Act of Congress under which the petitioner was indicted, and to instruct the jury what the Act allowed and what it forbade, thereby denying petitioner a fair and impartial trial as guaranteed to him under the Sixth Amendment of our Constitution.

Therefore, the case presents serious questions in the administration of Federal criminal justice.

Boyd v. U. S., 142 U. S. 450, 35 L. Ed. 1077;
McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819.

II.

STATEMENT OF THE CASE.

Petitioner, an attorney at law, of Franklin, Tennessee, was indicted and convicted for violating the Servicemen's Dependents Allowance Act. The indictment contained four counts.

The first count charged petitioner, as an attorney at law, of willfully and unlawfully receiving a fee of approximately $116.57 as compensation from Dora Thelma Deal on or about January 5, 1943, paid out of an amount of money paid to her pursuant to the Servicemen's Dependents Allowance Act of 1942, and paid to him as an agent or attorney in connection with a family allowance payable to the said Dora Thelma Deal, in violation of the Servicemen's Dependents Allowance Act of 1942 (R. 2).

The second count makes the same charge except it charges that the fee was received from Ellen Beard King on or about April 29, 1943, and the amount of the fee was approximately $20.00 (R. 2-3).

The third count makes the same charge as the second except the date of the offense is fixed as on or about August 1, 1943 (R. 3).

The fourth count charged that on or about March 1, 1944, petitioner willfully and unlawfully **charged and received** from Ellen Beard King a fee in the amount of $20.00 for assisting her to obtain a family allowance payable under the Servicemen's Dependents Allowance Act of 1942, as amended (R. 4).

The defendant, by motion, moved the trial court to compel the Government to elect whether petitioner should be tried upon the first count or upon the subsequent

counts and the motion was denied (R. 32-35; Motion, R. 10).

Petitioner then entered a plea of not guilty to the indictment and to each and every count thereof (R. 13, 35).

At the conclusion of the Government's proof petitioner moved the trial court to require the Government to elect whether it would rely upon the transactions referred to in the first count, or the transactions referred to in the subsequent counts of the indictment, which was overruled (R. 98-99; Motion, R. 10).

Petitioner was found guilty under all four counts of the indictment, was fined $500.00 under each of the counts, and on the fourth count was sentenced to the penitentiary for a period of a year and a day (R. 246). After the Court overruled the motion for a new trial, the sentence under the fourth count was reduced to one year (R. 264).

Petitioner moved the Court for a new trial, which was overruled (R. 16-22), gave notice of appeal, filed his grounds of appeal (R. 23-25), was permitted to remain on a $1,500.00 bond pending his appeal (R. 21-22), and filed his assignment of errors (R. 26-30).

Petitioner then filed a motion in the United States Circuit Court of Appeals for the Sixth Circuit and moved that Court to remand the case to the District Court in order that the District Court might entertain a motion for new trial on the ground of newly discovered evidence. The newly discovered evidence was disclosed in affidavits and filed as exhibits to the motion to remand (R. 280). The motion was granted and the case was remanded to the District Court for the Middle District of Tennessee and another motion for new trial was seasonably and properly filed. The motion for a new trial came on to be heard on January 20, 1947, at which time witnesses were produced

in open court and the motion was overruled (R. 293). Petitioner then amended his assignments of error, assigning as error that the District Court erred in refusing to grant him a new trial and filed the record of the proceedings with the United States Circuit Court of Appeals for the Sixth Circuit (R. 324).

The United States Circuit Court of Appeals for the Sixth Circuit, in an order signed by Judge McAllister, filed October 27, 1947, affirmed the judgment of the District Court (R. 327).

The Government, in chief, introduced and relied upon two witnesses to establish the charges made under the first count of the indictment, they being Thelma Deal and Charles Wikle.

The witness, Thelma Deal, testified that she was married, that she first met the petitioner sometime in 1942, when she went to him for legal advice after receiving a letter from a doctor demanding that a debt be paid; that during this time her husband was in the service and she didn't consider him as her husband any more according to her feeling, and was only married to him "by law," and admitted that she was going with and entertaining a boy friend while her husband was in the service (R. 44). She further testified that petitioner assisted her to make an application for an allotment and when the first check came, which was in the amount of $350.00, she took it to Franklin, Tennessee, to petitioner's office, endorsed the check and gave it to petitioner who left the office with the check and returned with $350.00 in cash of which he gave her $235.00, keeping $115.00. Petitioner told her, she said, that he always charged a third of what the check was (R. 39-40). She gave as her reason for going to petitioner with the allotment check, that petitioner told her to bring the check to his office when she received it

(R. 39), but on cross-examination said that her reason was that she didn't think she could cash the check herself, because it was a Government check (R. 50-51). She further testified she got the allotment in 1943 and that, subsequent to the wrongful charge made by petitioner, she went to petitioner to get him to represent her when her husband filed a divorce bill against her in 1944. She said that one of the charges in the bill was immorality and that when the husband got the divorce on grounds of cruel and inhuman treatment instead of desertion, she didn't think petitioner had properly handled the case and had been angered at petitioner for that (R. 45-47).

The witness, Charles Wikle, testified he was the cashier of the Williamson County Bank, Franklin, Tennessee, and was asked to identify a check in the amount of $350.00, dated January 30, 1943 and also identify the signature of the petitioner on said check, which was admitted by petitioner (R. 94). He further testified that the check was cashed at his bank (R. 94-95). On cross-examination he testified that he did not know Thelma Deal, that it would not have been proper banking practice for his bank to have cashed a check for Thelma Deal without having her identified, and that it was the custom at his bank to require an endorsement on Government checks from somebody who was known to the bank (R. 98).

The Government introduced in chief and relied upon the testimony of three witnesses to establish the charges made under counts two, three and four of the indictment relating to the transactions with Ellen Beard King. They were Ellen Beard King, Rosalie Peach and Charles Wikle.

The witness, Ellen Beard King, testified that she first met petitioner when she employed him to represent her after her husband sued her for a divorce (R. 54); that petitioner later sent her to the Red Cross for some papers,

that petitioner "filled out the papers" and mailed them and soon thereafter Government checks commenced to arrive (R. 55-56). She testified that the checks were addressed to her, in care of petitioner at his office and she would go to his office each month, petitioner would open the envelope, turn the check over without letting her know the amount thereof, have her sign her name on the back of the check, go cash the check and give her $20.00 less than its face value.

The District Attorney asked this witness to identify seven checks, dated April 29, June 1, July 1, August 1, September 1, October 1 and November 1 of 1943, and she said the transactions were the same on each check. Each one of the seven checks was in the amount of $62.00 and she testified that on each occasion she received $40.00 (R. 57-62). The District Attorney followed the same procedure in having the witness identify and give the same kind of testimony concerning four checks dated December 1, 1943, January 1, 1944, February 1, 1944 and March 1, 1944, and these last four checks were all in the amount of $80.00 and the witness testified that on each occasion concerning the last four petitioner gave her $60.00 (R. 62-64). This witness testified to all of these transactions, knowing exactly how much she received on every occasion, although she was unable to remember other important matters concerning herself, and other important transactions with the defendant, some of which are hereinafter listed. She didn't remember exactly when her child was born (R. 53), **didn't remember the time, not even the year, when she went to defendant's office to get her money from the checks before the checks were shown to her** (R. 57), didn't remember how long she lived with her aunt, Bertie Ambrose, on Route 4, Franklin, Tennessee (R. 67-68), was not sure where she moved to when she left said aunt (R. 68), didn't remember whether she went to see petitioner about getting

a divorce before her husband sued for a divorce (R. 71), said she never did have a bill prepared for a divorce, then was confronted with the divorce bill showing where she had sworn to the same, and then said she didn't remember about it at the time (R. 73), didn't remember any of the things she had put in the bill (R. 73), and didn't remember when her husband sued for a divorce (R. 74).

Without going into all the evidence showing how this witness was contradicted by petitioner and his witnesses, counsel desire to call to the attention of the Court that she was contradicted by her own mother. This witness testified that petitioner obtained an allotment for her mother and charged her mother $25.00 for getting the allotment (R. 81). The witness then admitted stating to her mother in the lobby of the Federal Building, "If you swear you didn't pay for getting that allotment, you will make me out a liar." **The witness' mother, Mrs. Clark Beard, testified that her daughter made the above statement, and that petitioner got an allotment for her and did not make any charge for his services** (R. 160).

It is the contention of counsel that if all the testimony of Ellen Beard King is taken as true, petitioner would not be guilty of the offense charged in Counts II, III and IV. She testified that during the transactions with petitioner she didn't know what she was supposed to get in the allotments, the petitioner never did tell her, nor did he show her what she was getting; **the first time she learned what she was to get was in March, 1944; that she never said anything to petitioner when she learned about it** (R. 82); **that petitioner did not solicit her to pay anything out of the checks; that petitioner had not let her find out what she was getting** (R. 83), **and had not told her he was going to charge her anything for his services** (R. 84).

The witness Rosalie Peach testified that she went with Ellen Beard King several times to the petitioner's office,

that on each occasion she would sit in the waiting room. Ellen Beard King would go in the petitioner's private office and close the door, the petitioner would soon come out and leave, and then soon return, that Ellen Beard King and she would then leave and as soon as they reached the sidewalk Ellen Beard King would count the money. When asked how much Mrs. King would have, she answered, "Well, when she was getting $62.00, she would have $40.00." She then admitted that she never had seen any of the checks (R. 91-93).

The last witness used in chief to establish the charges of the last three counts was Charles Wikle, Cashier of the Williamson County Bank. He identified the signature of petitioner on the checks. On cross-examination he testified that it would not have been proper banking practice for the bank to have cashed checks for Ellen Beard King without having her identified, and that it was the custom of his bank to require an endorsement on Government checks from somebody who was known to the bank (R. 94, 98).

After Charles Wikle testified the District Attorney announced "the Government rests its case." The petitioner then moved the Court to require the Government to elect whether it would rely upon the transaction with Thelma Deal, referred to in the first count, or the transactions with Ellen Beard King, referred to in the subsequent counts of the indictment. The motion was overruled (R. 98-99; Motion, R. 10), and petitioner introduced his proof.

Petitioner, Robert H. Polk, testified that he was a practicing attorney at Franklin, Tennessee, admitted to practice in all the Courts of the State of Tennessee, the United States District Court and the Supreme Court of the United States (R. 99-100). He admitted that he assisted both Thelma Deal and Ellen Beard King in procuring their allotments, admitted that it was his signature on the checks, stated that he endorsed the checks merely as an accommo-

dation in order to identify the payees, and denied that he ever contracted to receive or did receive any fee or compensation from said persons for his services in procuring their allotments (R. 101 and 108). He testified that he was familiar with the Act under which he was indicted (R. 100) and that he had handled several hundred of these allotment matters, had never charged anybody for getting allotments and that when this trouble came up representatives of the FBI came to his office and that he offered them all of his files and stated to them that he was proud of the record of the hundreds of cases he had handled and later went over the voluminous files with a member of the FBI (R. 115). He testified that he permitted Ellen Beard King to use his address for her allotment checks until she got a permanent address, that she told him she didn't want the people where she was staying to know how much she was getting, and that Ellen Beard King never did live at any one place very long (R. 108). He introduced a copy of a letter sent to Ellen Beard King, dated September 20, 1943, stating that he hoped she would arrange for a permanent address and asked her to notify the Office of Dependency Benefits to send her check at her address (R. 109). He denied that he ever opened an envelope containing Ellen Beard King's check, or that he ever turned any of the checks over to keep her from learning the amounts of them. He further testified that Ellen Beard King would come after her check, that he would give her the envelope, she would open the envelope and remove the check, that she would want to get it cashed and she would endorse it and he would endorse the check and get it cashed for her (R. 114-115). He further testified that he often cashed Government checks for people, or identified them by his endorsement, and that sometimes he would call the bank on the telephone and advise the teller that he was sending a check over to the bank, endorsed by him, and asked that it be cashed (R. 103-104).

The next witness for the defense was Mrs. Lizzie Griggs, who was put on the stand to show that it was not the defendant's regular custom to charge one-third of an allotment obtained, and to show that he made no customary charges in connection with allotments. Upon objection of the District Attorney this witness was not permitted to testify (R. 135-137). It was then stipulated what the testimony of this witness would be and also the testimony of sixteen other witnesses (R. 137; Stipulation, R. 266-269). These witnesses were then excused (R. 137).

The next witness called for the defense on the facts of the case was Mrs. Mary Green. Mrs. Green testified that she was fifty-six years of age, lived at Franklin, Tennessee, and was petitioner's secretary (R. 140-141); that the petitioner handled a great many matters pertaining to dependents of soldiers; that she was very familiar with petitioner's manner of conducting his law business; that he never charged any fees for any type of this work in connection with allotments (R. 141-142); that people often came to petitioner's office to get assistance in getting checks cashed, and that petitioner or she often went either to the bank or the Franklin Power & Light Company (next door) to identify them (R. 150); and that the checks payable to Ellen Beard King came to petitioner's office as a favor to Ellen Beard King, because she had no permanent address (R. 147).

The next witness called for the defense was Mrs. Clark Beard. She testified she was the mother of Ellen Beard King and was in court under petitioner's subpoena; that the petitioner obtained an allotment from the Government for her and that the defendant did not make any charge for his services (R. 159-160). With reference to a previously mentioned conversation with her daughter in the hall of the Federal Building, she testified as follows:

"Q. Now, while you were here waiting to testify, did you talk to your daughter Ellen Beard King out in the corridor in the presence of Mrs. Green?

A. Yes, sir.

Q. Did your daughter say to you that if you testified that Mr. Polk didn't charge you for obtaining that allotment you would make her out a liar?

A. Yes, sir, she said that.

Q. You are certain she said that?

A. Yes, sir, she said that.

Q. What did you tell her then?

A. I says, 'Why, Ellen, I want to tell the truth, the truth won't hurt nobody' " (R. 160).

Petitioner then called, as a character witness, Tom Henderson, sixty-three years of age, a member of the Franklin Bar since 1904, formerly Solicitor General for the State of Tennessee, and he testified that petitioner was entitled to full faith and credit on his oath (R. 166-172). Similar testimony was given by Judge Wallace Smith, before whom petitioner regularly practices. Judge Smith testified that he was Judge of the Seventeenth Judicial Circuit of Tennessee, and that he held Circuit and Criminal Court in five counties and Chancery in four counties (R. 172-174). Similar testimony was also given by Judge Jerre Fly, County Judge of Williamson County, before whom petitioner regularly practices (R. 174-177), the same was given by John H. Amos, a business man of Nashville and Franklin, Tennessee (R. 177-180), and also the same was given by D. L. Hawkins, formerly Clerk of the Circuit Court of Williamson County, Tennessee (R. 137-140).

After petitioner closed his case, the Government put on the following as rebuttal testimony (R. 186):

The first rebuttal witness for the Government was Mrs. Elizabeth Ragsdale, Asst. Cashier of the Williamson County Bank. It is a fair inference this witness was called to contradict and impeach petitioner's testimony that the Williamson County Bank always required some person

known to it to endorse a check for a person not well known to it. The District Attorney attempted to show, while cross-examining petitioner, that the bank did not require petitioner to endorse a check to identify the payee when that particular payee had previously had a check cashed at the bank, and went into great detail asking petitioner to describe the exact manner in which the introductions at the bank would be made and what the custom was in identifying people at the bank (R. 118-121). Mrs. Ragsdale testified on direct examination as follows:

> "Q. If he brought a person over and introduced them to you on one occasion and endorsed the check and then that person came back later, or he came back later with the person, with another check, would you again require him to endorse the check?
>
> A. Yes, I would have unless I knew the person that came back.
>
> The Court: He said after he had introduced them to you?
>
> A. If she came back the same day, I wouldn't, but later I most likely wouldn't remember that person.
>
> Q. Let's suppose one day, say along about April 29, he came in and introduced a person to you and you had him endorse the check, then on June 1st he came in again with this same person and you had him endorse the check again?
>
> A. Yes, sir, I would have.
>
> Q. Then say the third time, a month later, he comes in again with that same person, along about the first of the month each time, and presents that person for the payment of a check, would you have him again endorse the check?
>
> A. Yes.
>
> Q. You think you would?
>
> A. I am sure I would.
>
> Mr. Osborn: All right, you may ask her" (R. 187-188).

She testified on cross-examination that she had a good many dealings with petitioner, that he identified many

people, and that if the bank did not know the payee of a check it invariably required somebody it did know to endorse the check as identification (R. 188-189). She also corroborated petitioner that he frequently called the bank, informing it that he was sending some person to get a check cashed and that he had indorsed the check for identification (R. 188).

The Government then called R. L. Richardson, James Campbell and Ned Eggleston, members of the Franklin Bar, who testified that petitioner was not entitled to full faith and credit on his oath (R. 193-200); Earl Gatlin, Sheriff of Williamson County, also testified that from his reputation petitioner was not entitled to full faith and credit on his oath (R. 201). On cross-examination, however, this witness testified he would believe petitioner and, from what he knew and heard, he would take his oath and believe what he said (R. 201).

It developed from some of the character witnesses on both sides that petitioner had taken an active part in politics, and that his campaigns had excited a great deal of acrimonious controversy (R. 196), that he had been active in factional political fights (R. 197), and that his conduct at the Bar had "been such that stirred up animosities among his brethren at the Bar." For example, he took a pro confesso against one of Mr. Eggleston's clients not long before Mr. Eggleston testified in this case.

The Government was then permitted, over the objection of the petitioner, to introduce Mrs. O. B. Skinner and Mrs. Thelma Tomlin as witnesses.

The District Attorney had asked a question of the witness, Mrs. Mary Green, Mr. Polk's secretary, attempting to lay grounds for placing before the jury the testimony of Mrs. O. B. Skinner. He asked Mrs. Green if she was acquainted with "Mrs. O. B. Skinner," and Mrs. Green

said she did not know her. Then the following question was asked:

> "Q. Didn't Mrs. O. B. Skinner come to Mr. Polk's office in Franklin, Tennessee, and ask what the usual charge was for filling out an allotment application and you told her the usual charge was $25.00?
>
> A. No, sir, that is not so. She never came to the office, and I didn't tell her any such thing" (R. 156).

If there be any doubt that these questions were planned and cunningly phrased to lay a trap for the witness, Mrs. Green, in order to warrant calling Mrs. Skinner to the stand, such doubt will be dispelled by the fact that Mrs. Mary Green knew her by "Mrs. Bessie Skinner" (R. 229), which was bound to have been known by the District Attorney, because certain receipts, in his possession, which he later introduced as exhibits, were made out to "Mrs. Bessie Skinner" (R. 203-204).

Mrs. Skinner testified that **she lived at 232 First Avenue, Franklin, Tennessee**, and that in December, 1943, she had petitioner to assist her in making an application for an allotment, and that he charged her $15.00 for his services. She had three receipts, showing she paid the $15.00 in $5.00 payments. The receipts bore the name "Mrs. Bessie Skinner," and the first two were signed by Mrs. Mary Green, and the last one by petitioner (R. 205-206). She further testified that petitioner did not render any other service for her (R. 202) and that she received the following letter:

> "Dear Mrs. Skinner:
>
> "I have been accused of taking fees for getting people allotments, and the only way I can show the charges to be false is by the testimony of those who know I never have charged them one cent for aiding them.
>
> "I am asking you to come to my office Saturday

morning, November 24th 1945, about 10 o'clock, and talk with my attorney and I.

"I believe you will want to aid me in this matter.

"Yours very truly,
Robt. H. Polk."
(R. 206-207.)

She testified on cross-examination that she did not receive a letter from the Office of Dependency Benefits, Newark, N. J., addressed to "Mrs. Bessie T. Skinner, 232 1st Ave., Franklin, Tenn.," although she admitted that was her address, requesting certain evidences of dependency for allotment. She denied that it was necessary for her to get affidavits to prove she was dependent on her son (R. 209-210).

Mrs. Thelma Tomlin testified that **she lived at 232 First Avenue, Franklin, Tennessee,** and that petitioner made an application for an allotment for her and charged her $15.00 for his services in filling out the allotment papers. She testified she paid $5.00 the first time and $10.00 the second time. She presented receipts containing petitioner's heading, one in the amount of $5.00 and the other in the amount of $10.00. Both receipts were signed by petitioner's secretary, Mrs. Mary Green, and on the line after the word "For" was "Services in Allotment" and received of Mrs. Wade Tomlin (R. 211-214). She testified that petitioner never represented her husband, never did anything for her children, **and this allotment paper was the only work he had ever done for her** (R. 213). This witness also received a letter from petitioner inviting her to his office, as did Mrs. Skinner (R. 215). On cross-examination, she testified that she procured affidavits concerning her three children, **birth certificates and a certified copy of her divorce decree, and paid for them herself** (R. 215-216).

Petitioner was recalled and testified that the only thing his file showed on Mrs. Skinner was a letter addressed

to Mrs. Bessie Skinner, 232 First Avenue, Franklin, Tennessee, relating to Delton Lee Skinner; that he always kept a copy of the application for an allotment and there was none in his file and that he had no recollection of having made out an application for Mrs. Skinner. He testified that the fee was likely for legal services done in preparing evidence for Mrs. Skinner (R. 221-223).

In reference to the Tomlin matter petitioner testified that his file showed that he had to perform legal services for the alteration of a birth certificate in order to get a delayed certificate of birth on John Charlie Tomlin, a child of Mr Thelma Tomlin (R. 225); that his file showed that Mrs. Tomlin's husband had deserted and left her with three children and she had obtained a divorce. Mrs. Tomlin was on relief and came to the defendant in 1942 to employ him to locate her husband and prosecute him if he could be found. The husband was located driving a truck out of Washington, D. C., and petitioner procured a warrant for his arrest for failure to provide. Petitioner later learned he was in the Army. His files further showed a copy of a letter addressed to the Office of Dependency Benefits, dated November 26, 1943, which showed petitioner sent three certified copies of birth certificates and a certified copy of a divorce decree relative to matters of John W. Tomlin (R. 225-227). From these records he testified he was sure he made out an application for Mrs. Tomlin, but not for Mrs. Skinner (R. 227).

Mrs. Mary Green was recalled and she testified that she remembered Mrs. Skinner but knew her as Mrs. Bessie Skinner. Her explanation of writing after the word "For" the words "Services in Allotment," she did not know what work petitioner did for Mrs. Tomlin and she asked Mrs. Tomlin what it was for and she put down what Mrs. Tomlin told her, without the knowledge of petitioner (R. 229-230). She denied that she told Mrs. Skinner that peti-

tioner charged for getting an allotment, said that Mrs. Skinner asked her what petitioner charged in divorce cases and she replied that he charged $25.00 for uncontested cases.

EVIDENCE ON MOTIONS FOR NEW TRIAL.

At the hearing on motion for a new trial before the District Court on January 29, 1946 (R. 248), it was shown that, according to the records of the Office of Dependency Benefits, Mrs. Skinner did not file an application for an allotment as she testified at the trial (R. 249-250).

At the hearing on motion for a new trial on January 20, 1947, while the case was on remand for that purpose, it was shown that, according to the records of the Office of Dependency Benefits, Mrs. Tomlin had **not at any time made application for an allotment**, as she had testified at the trial (R. 280). It was also shown at this hearing by the affidavit of Mary S. Ashworth, Circuit Court Clerk of Williamson County, Tennessee, that Mrs. Tomlin had not at any time obtained a certified copy of a divorce decree nor paid for the same, as she had testified at the trial (R. 291). It was also shown at this hearing that Mrs. Tomlin testified falsely at the trial when she said that petitioner had not represented her in any other matters except to assist her in making application for an allotment (Statement of Jesse B. Poteete, R. 286-288).

At the hearing of January 20, 1947, it was also established by the testimony of Jasper King, husband of Ellen Beard King, that Ellen Beard King admitted after the trial that she had testified falsely about petitioner (R. 296). This testimony was corroborated by the witness Noble King (R. 309).

III.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Sixth Circuit erred in sustaining petitioner's conviction and in not remanding the case for a new trial on the following grounds:

1. There is not any competent and substantial evidence relating to the II, III and IV Counts of the indictment that the petitioner solicited, charged or received any sum as a fee for assisting in obtaining an allowance under the provisions of the Servicemen's Dependents Allowance Act.

2. The trial court erred in instructing the jury that petitioner, under Counts II, III and IV of the indictment, would be guilty of the offense charged if he received any part of the allowance checks from the United States Government payable to Ellen Beard King, without stating that such a reception, to constitute the offense charged, would have to be received on account of certain services rendered in connection with the allotments (R. 236-237). Petitioner excepted to this portion of the charge (R. 12).

3. The trial court erred in refusing to instruct the jury, as was requested by petitioner in a special request (infra, pp. 3-4), which in substance is as follows:

That if the jury should find from the evidence that petitioner did not directly or indirectly solicit, contract for, charge or receive any fee or compensation for assisting Ellen Beard King in obtaining an allowance under the Servicemen's Dependency Act, that they should return a verdict of not guilty under the second, third and fourth counts of the indictment, and that they should return such a verdict regardless of whether or not they believed the evidence showed him guilty of having defrauded the recipient of the allowances of money which she had received from the Government.

4. The trial court erred in receiving as evidence, over the objection of petitioner, the testimony of Mrs. O. B. Skinner and Mrs. Thelma Tomlin, which in substance was as follows: That petitioner had assisted them in making applications for allotments, that allotments were obtained for them, and that they paid petitioner a fee for such services (R. 202-221).

5. The trial court erred in sustaining the objection of the District Attorney to the testimony of petitioner's witness, Mrs. Lizzie Griggs, that petitioner had not made any charge in obtaining an allotment for her, and erred in ruling that petitioner could not offer any of the sixteen other witnesses whose testimony would have been similar to Mrs. Lizzie Griggs' (R. 135-136, 266-269).

6. The trial court erred in not granting petitioner a new trial upon the ground of newly discovered evidence, as stated, infra, pp. 6-7, which in substance is as follows:

That according to the records of the Office of Dependency Benefits Mrs. O. B. Skinner had not at any time applied for a family allowance as she testified and for which she said petitioner was paid a fee (R. 19-21, 202-211); that according to the records of the Office of Dependency Benefits, Mrs. Thelma Tomlin had not at any time applied for an allotment as she testified and for which she said petitioner was paid a fee (R. 280); that according to the testimony of Jasper King, husband of Ellen Beard King, the material testimony of Ellen Beard King was admitted by her to have been perjured (R. 296); and that according to Jesse Blythe Poteete and Mary S. Ashworth, Circuit Court Clerk of Williamson County, petitioner represented Mrs. Tomlin in other matters than that testified by Mrs. Tomlin, and that Mrs. Tomlin did not obtain a certified copy of the divorce decree and pay for the same from Mrs. Ashworth, as Mrs. Tomlin had testified at the time of the case (R. 286-8, 291).

IV.

ARGUMENT.

The questions presented in this case have heretofore been listed under the heading "Summary Statement of the Matters Involved" and under the heading, "Specification of Errors," to which reference is here made, and they will be herein discussed in the order listed. For the convenience of the Court and purpose of brevity, questions will be combined under the same heading where the cases cited are applicable thereto:

SUMMARY OF ARGUMENT.

Point A: Sufficiency of Evidence (Question 1). There is no evidence in the record to sustain a conviction on the II, III and IV Counts of the indictment.

Point B: Charge of the Court and Refusal of Special Request (Questions 2 and 3). The District Judge did not properly charge and explain to the jury the denunciatory provisions of the Act, and refused upon seasonable request so to charge and explain.

Point C: Testimony of Mrs. Skinner and Mrs. Tomlin (Question 4). The testimony of Mrs. Skinner and Mrs. Tomlin was evidence which tended to show that petitioner had committed other crimes wholly independent of that for which he was on trial and the evidence was irrelevant, inadmissible and prejudicial to petitioner.

Point D: Testimony of Lizzie Griggs and Sixteen Other Witnesses Excluded by Trial Court (Question 5). Since the Government was allowed to introduce evidence that a defendant customarily commits crimes similar to the one for which he is on trial, the defendant should be allowed to introduce evidence that he does not customarily commit such offenses.

Point E: Denial of New Trial on Newly Discovered Evidence (Questions 6 and 7). Subsequent to the trial it was established on a motion for a new trial that neither Mrs. Tomlin nor Mrs. Skinner had ever made applications for allotments, although they were permitted to testify at the trial that petitioner had assisted them to make applications and charged them a fee for such services. It was also established that Ellen Beard King had admitted, after the trial, that she had testified falsely against petitioner, infra, pp. 6-7.

POINT A.

Sufficiency of Evidence (Question 1).

It is proper to state here that a motion for directed verdict was not made. However, the purpose of such motion was served because the trial court had its attention called to the insufficiency of the evidence to sustain a conviction on the second, third and fourth counts of the indictment at the conclusion of the Government's proof by a motion to elect (R. 10) at the time he charged the jury by special request No. 1, which requested peremptory instructions as to the second, third and fourth counts (R. 11), the exception to the charge on these counts (R. 12), and the question relating to the second, third and fourth counts was discussed on the motion for a new trial and the trial judge stated: "The question raised by the motion for a new trial as to the last three counts of the indictment is a perplexing one, as well as highly technical. I was confronted by that fact at the time the jury was charged, both because motion had been made to require the Government to elect and on account of the special instructions submitted by the defendant, . . ." (R. 261-262).

Although a motion for a directed verdict was not made in the lower court at the close of all the evidence, this Court may in the interest of justice pass on the sufficiency of evidence.

> Wiborg v. U. S., 163 U. S. 632, 41 L. Ed. 289;
> Cyc. Fed. Procedure (2d Ed.), Vol. 9, Sec. 4332, pp. 456-457.

Petitioner insists that this is a proper case for this Court to pass on the sufficiency of the evidence, especially relating to the second, third and fourth counts of the indictment in order to prevent a miscarriage of justice.

Relative to the sufficiency of the evidence to sustain a conviction on the first count (R. 2), counsel for petitioner concedes there is some evidence from the testimony of Thelma Deal (R. 38-40) indicating that the petitioner did receive a sum of money as a fee on account of services rendered in connection with an allotment, under the Act, for the benefit of the witness, Thelma Deal. But, as will hereinafter appear, the record indicates that the jury verdict on the first count was not obtained by the testimony of Thelma Deal, but was obtained as a result of an erroneous reception of prejudicial evidence and an erroneous charge, both of which will be hereinafter discussed.

Petitioner contends that there is not a word of proof in the record that the defendant charged or received any sum from Ellen Beard King as a fee or compensation for assisting her in obtaining the allowance as charged in the indictment.

The great preponderance of the evidence establishes the fact that petitioner is innocent of the acts as testified to by Ellen Beard King and had it not been for the prejudicial evidence of Mrs. Tomlin and Mrs. Skinner, hereinafter discussed, a verdict of guilty would never have been found by the jury.

It is the contention of counsel for petitioner, assuming without admitting that all the testimony of the government relating to the second, third and fourth counts is true, that still petitioner would not be guilty of the offense with which he was charged. In such a situation he might have been guilty of larceny by trick, embezzlement or fraudulent breach of trust, but it is our contention that those offenses are not denounced by the Servicemen's Dependency Allowance Act of 1942.

Since there are no common-law crimes against the United States, one may not be punished for a crime against the United States unless the facts are shown, plainly and un-

mistakably, to constitute an offense within the meaning of the particular Act of Congress under which he is on trial.

U. S. v. Gradwell, 243 U. S. 476, 61 L. Ed. 857;
U. S. v. Resnick, 299 U. S. 208, 81 L. Ed. 127;
Fasulo v. U. S., 272 U. S. 626, 71 L. Ed. 443.

No principle of law is better settled than that penal statutes are strictly construed against the government.

U. S. v. Wiltberger, 5 Wheat. 77, 5 L. Ed. 27;
U. S. v. Chase, 135 U. S. 255, 34 L. Ed. 117;
U. S. v. Resnick, supra.

The principles of law governing the construction of a penal statute were very aptly stated by the distinguished jurist, John Marshall, while serving as Chief Justice of the Supreme Court, in the case of U. S. v. Wiltberger, supra, repeatedly cited by the Courts as follows:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.
>
> "It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no

> room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases'' (5 L. Ed., p. 42).

Applying the above stated propositions of law to the case at bar, it is clear that the alleged transactions of petitioner with Ellen Beard King were not offenses denounced by the Act under which petitioner was indicted. Section 219 of the Act, as it was before being amended, which is pertinent to the second and third counts, prohibits any part of the allotment to be paid or received by an agent or attorney on account of services rendered in connection with any family allowance. By the plain language used in this section, if an attorney assisted a dependent in obtaining an allotment and he was paid, or he received any part thereof, as a fee or compensation for his services for helping the dependent to procure the allotment, such act of receiving a fee would be a violation of the statute. However, under the Act there are many ways that a lawyer could receive a part of the funds paid to a dependent without it being an unlawful receiving as far as the United States is concerned. If a dependent paid a lawyer a fee for services rendered in a matter, other than that of obtaining the allotment for the dependent, and the fee was paid out of the funds received by the dependent from the Government, there would be no unlawful receiving under

the Act. If a dependent paid a lawyer a fee for his services in procuring an allotment, and did not pay it out of the funds that were received by the dependent pursuant to the provisions of the statute, it would not be an unlawful receiving by the lawyer. The statute was amended to take care of that very situation. **If a lawyer had assisted a dependent to obtain an allotment and later had stolen the dependent's pocket book when he knew it contained the allotment money from the check recently cashed, could it be said the statute covered such act? If the lawyer assisted a dependent to obtain an allotment and did not ever intimate that a fee would be charged, cashed the check for the dependent and returned from the bank with only part of the money unbeknown to the dependent, could it be held that such offense is denounced by the Servicemen's Dependents Allowance Act? If the term "on account of" is to be considered as part of the statute, it seems logical that the sum of money must be received as a fee or compensation "on account of" or "because of" or "for" services rendered in obtaining the allowance.**

Section 219 of the Act, as amended, under which the defendant was indicted, in the fourth count, provides that "any person who shall, directly or indirectly, solicit, contract for, charge, or receive or shall attempt to solicit, contract for, charge, or receive any fee or compensation for assisting in any manner an enlisted man or dependent in obtaining a family allowance payable under this chapter, shall, upon conviction thereof, be guilty of a misdemeanor." From the amended act it can be readily seen that the amendment changed the effect of the Act so that a fee paid to a lawyer by a dependent or an enlisted man, from any source, for assisting a dependent to obtain an allowance, was denounced by the Statute. It will be noticed that the term "on account of services rendered" was changed to read "charge or receive any fee or compensation for assisting . . .". When this amendment was being consid-

ered the Committee on Military Affairs made the following report on this section:

> "Section 11 of the bill amends section 119 of the act. The present section prohibits an agent or attorney being paid any 'part of the amount paid pursuant to the provisions of this title.' Obviously any amount paid from any other source is not within the prohibition of the statute. The change attempts to create an effective sanction in the situation. The proposed amendment however, does not prohibit a bank, for example, from making a charge for the transfer of an amount already paid as a family allowance. Nor is it the opinion of the committee that a person would be liable for a misdemeanor by accepting a legal notarial fee in connection with a family allowance application; nor for accepting a fee for copies of documents, such as a divorce or adoption decree. In other words, this section does not cover commercial assistance rendered in such matters" (U. S. Code Congressional Service, 1943, No. 7, pp. 2-246).

It is our contention that the amended section does not denounce the transactions relied upon by the government to sustain a conviction under the fourth count. Under the amended section it is still necessary that a fee or compensation be received "on account of" or "for" services rendered the dependent for assisting the dependent to obtain an allotment. It is our contention that there is an utter lack of proof that petitioner charged or received any sum from Ellen Beard King as a fee or compensation for assisting her in obtaining her allotment, therefore there is no evidence upon which a conviction could legally stand on either the second, third or fourth counts.

POINT B.

Charge of the Court and Refusal of Requests Relative to Second, Third and Fourth Counts (Questions 2 and 3).

It is the duty of the trial judge to instruct on essential questions of law, without request.

Cyc. Fed. Procedure (2d Ed.), Vol. 9, Sec. 4418, p. 532;
Schmeller v. U. S., 42 Fed. (2d) 544 (6 CCA).

It is well settled that a refusal, by a trial judge, to give a requested instruction incorporating the correct proposition of law not covered in the general charge is reversible error.

Welty v. U. S., 2 Fed. (2d) 562;
Hendrey v. U. S., 233 Fed. 5;
Schmeller v. U. S., supra.

This question was presented to the United States Circuit Court of Appeals for the Sixth Circuit in the case of Welty v. U. S., supra, and in that case a provision of the applicable section of the War Risk Insurance Act was almost identical with the amended section of the Act which the Court is now being called upon to construe. In the Welty case an attorney had been convicted of violating the War Risk Insurance Act, Sec. 13 of said Act providing:

> "Any person who shall, directly or indirectly, solicit, contract for, charge, or receive or who shall attempt to solicit, contract for, charge or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and each and every offense shall be punishable by a fine of not more than $500, or by imprisonment at hard labor for not more than two years or by both such fine and imprisonment."

The question involved in the case was succinctly stated in the opinion:

> "The vital question in this case was whether or not the defendant indirectly solicited or received compensation out of the funds that belonged to the insane applicant, or whether his dealings were entirely with and on behalf of the father and his compensation to be paid solely out of anything that the father might justly recover from the estate of his son."

The holding of the United States Circuit Court for the Sixth Circuit was as follows:

> "By no subterfuge can the prohibited payments be indirectly solicited or received; and while the judgment of the state court may be binding as between the parties thereto—if in fact it be but a step in the carrying out of the subterfuge—the judgment rendered therein affords no defense in this case. There was, however, a sharp conflict in the testimony. It was vital that the jury be carefully instructed as to the sound interpretation of the act and that a clear line of demarcation be drawn between what the law allowed and what it forbade. Such an interpretation was asked for by the defendant and was refused. The trial judge was of the opinion that the language of the act spoke for itself and required no comment.
>
> "The government contends in this court that if the defendant contracted originally with the father with reference to a fee in excess of $3, and such contract 'related to the claimant's demand against the government, whether the understanding was that Mr. Welty's fee and compensation were to come out of the reimbursement of the father or not, it was still such a contract as was contemplated by Congress within the meaning of this statute because it was an incentive to prosecute this claim against the government for mercenary reasons and therefore against public policy.' We cannot agree to this contention under a sound interpretation of the statute. It but reinforces, however, the propriety of the defendant's request to

charge, and satisfies us that the refusal thereof is such error as compels a reversal of the judgment.

"Reversed and remanded."

Applying the propositions of law cited above under the heading now being discussed and the propositions of law cited above under the heading of "Sufficiency of Evidence," it is our contention that petitioner was entitled to have submitted to the jury the instructions as set out in the petition, infra, pp. 3-4, and the trial court prejudiced petitioner's defense and denied him a fair trial by giving the instructions as set out in petition, infra, pp. 2-3, and found in the Record, pages 236-237. It is an established rule of criminal law that a defendant has a right to have presented to the jury instructions relating to all theories of defense, whether the defense is disclosed in the pleadings or the evidence, whenever there is any evidence to support such theory or theories, and if such instruction is not covered by the general charge and a timely request is made, it is reversible error for the trial judge to refuse such request. If Ellen Beard King's testimony was taken as true the defendant was guilty of larceny, embezzlement or fraudulent breach of trust, but was not guilty of any offense denounced by the Servicemen's Dependents Allowance Act. The defendant was certainly entitled to have the jury instructed as to what acts the statute denounced. **The only reasonable inference that could be made from the charge as set out in petition, infra, pp. 2-3, is that the jury was told that it was its duty to return a verdict of guilty on the last three counts if they found that the defendant received any of the proceeds of Government checks to Ellen Beard King, whether he received it as a fee in another matter, or whether he obtained it as a result of larceny or embezzlement, or in any other manner.**

The trial court was convinced that petitioner could be found guilty of all the last three counts, provided the jury

found that he had received some money from Ellen Beard King, regardless of how it was received. The trial judge charged the jury:

> "Now, gentlemen, that is the only issue that is being tried in this case,—as to whether or not the defendant received these amounts specified" (R. 243).

The Court's view is also shown by the following excerpt from a colloquy with counsel at the time of the hearing upon the motion for a new trial:

> "Mr. Williams: . . . So the only way a conviction could be sustained under the proof on the last three counts would be upon the assumption that the Act denounced the receiving of money that had come from the Government for any purpose. I don't believe it is broad enough to cover that.
>
> "The Court: I think it is. It says: 'No part of any amount paid pursuant to the provisions of this title shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with any family allowance,' " (R. 251-252).

The defendant surely was entitled, when he stood before a Court charged with an offense which upon conviction would utterly destroy his entire professional career, to have the jury instructed on the exact things that the act denounced as an offense and what it did not.

The holding of the United States Circuit Court of Appeals for the Sixth Circuit in the case of Welty v. U. S., supra, wherein it stated that "It was vital that the jury be carefully instructed as to the sound interpretation of the act and that a clear line of demarcation be drawn between what the law allowed and what it forbade" (p. 564) is certainly applicable to the case at bar.

POINT C.

Testimony of Mrs. Skinner and Mrs. Tomlin (Question 4).

Although the order of proof is largely in the discretion of the trial court, it is ground for reversal if there has been an abuse of discretion.

Goldsby v. U. S., 160 U. S. 70, 40 L. Ed. 343;
Hoffman v. U. S., 68 Fed. (2d) 101;
Marron v. U. S., 8 Fed. (2d) 251.

It is an abuse of discretion to admit testimony, as rebuttal, of another offense similar to the one with which the defendant is charged, to rebut defendant, who had stated that he never committed the offense in his entire life.

Weil v. U. S., 2 Fed. (2d) 145.

It is such abuse of discretion as to require a reversal where the evidence in rebuttal is of a separate offense other than that for which the defendant is on trial.

Coulston v. U. S., 51 Fed. (2d) 178.

For purpose of impeachment a witness may be asked about any specific vicious or criminal act of his past, but the cross-examiner is bound by the answer and cannot rebut the testimony by other witnesses, except where a judgment of conviction of the crime has been shown.

U. S. v. Sager, 49 Fed. (2d) 725;
Hanover Fire Ins. Co. v. Dallavo, 274 Fed. 258 (6 C. C. A.);
Power v. State, 117 Tenn. 363.

A party cannot, by drawing out on cross-examination statements by a witness which are irrelevant and collateral to the principal issues, gain the right to contradict such

testimony by showing inconsistent statements of the witness at other times.

> **Jones' Commentaries on Evidence, Vol. 6 (2d Ed.), Sec. 2399, pp. 4726, 4727 (quoted, citing two pages of cases).**

The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible.

> **Boyd v. U. S., 142 U. S. 450, 35 L. Ed. 1077;**
> Hall v. U. S., 150 U. S. 76, 37 L. Ed. 1003.

To be sure, this general rule is subject to well known exceptions permitting the introduction of such evidence for the purpose of establishing identity, scienter, motive, etc., no one of which is relevant here, where the introduction of such proof could serve no purpose except to indicate that the petitioner would be more likely to commit the crime charged in the indictment because it was testified that he had theretofore committed offenses of like nature.

Even "where the facts of the case bring it within one of the exceptions to the general rule . . . the courts generally require that evidence of the accused's guilt of another crime shall not be admitted unless the proof of the other crime is clear and sufficient to authorize a finding of the defendant's guilt of such other crime; in other words, its commission must be shown beyond reasonable doubt." (20 Am. Jur. [Evidence], Sec. 318.)

In this case the only help that could have been given the Government's case by testimony of other offenses was to show petitioner's "propensity to commit crimes of the same sort as the one charged," a purpose altogether illegitimate. (Fish v. U. S. [C. C. A. 1st], 215 F. 544, L. R. A. 1915A, 809.)

"It is not competent to prove that the defendant committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the indictment."

20 Am. Jur. (Evidence), Sec. 309 (quoted);
Hall v. U. S., 150 U. S. 76, 37 L. Ed. 1003;
Boyd v. U. S., 142 U. S. 450, 35 L. Ed. 107.

"Where the facts of the case bring it within one of the exceptions to the general rule that evidence of an independent crime is not admissible, the courts generally require that evidence of the accused's guilt of another crime shall not be admitted unless the proof of the other crime is clear and sufficient to authorize a finding of the defendant's guilt of such other crime; in other words, its commission must be shown beyond a reasonable doubt."

20 Am. Jur. (Evidence), Sec. 318 (quoted);
Wrather v. State, 179 Tenn. 666, 169 S. W. (2d) 854;
Haley v. State, 84 Tex. Crim. Rep. 629, 209 S. W. 675;
Pelton v. State, 60 Tex. Crim. Rep. 412, 132 S. W. 480, Ann. Cas. 1912 C, 86;
Annotation: 3 A. L. R. 784.

"Whether the scope of the inquiry is confined to general reputation for veracity or extends to general moral character, the authorities are quite uniform in holding that **the character of a witness cannot be impeached by proof of particular acts of immorality or wrong doing.**"

28 Ruling Case Law, Sec. 211, p. 623 (quoted);
Teese v. Huntingdon, 23 How. 2, 16 U. S. (L. Ed.) 479;
Weil v. U. S., 2 Fed. (2d) 145.

In order to demonstrate clearly that the above propositions of law are applicable to Question 3, the entire background of the question, as shown by the record, will be herein stated in the same order as was presented at the trial.

(1) The Government put on testimony to show that petitioner made it a custom to charge a fee for filling out allotment papers and that he regularly charged one-third of the recovery (Test. Thelma Deal, R. 40).

(2) Petitioner was asked on direct examination if it was his custom to make charges for allotment matters and he replied that he had never charged anybody for this kind of work (Test. Robt. H. Polk, R. 102).

(3) The defense then put on a witness, Mrs. Lizzie Griggs, to further rebut the testimony of the Government, to show that petitioner did not make it a regular custom to charge a fee for assisting to obtain an allotment and had sixteen other witnesses for the same purpose (R. 135-137). The District Attorney objected in the following manner:

> "Mr. Osborn: Yes, Your Honor, on the ground that there may be a case or cases in which he didn't make a charge but that has no probative value in these two cases in which it is alleged that he did make a charge. There might be a thousand people he didn't charge, there might be a thousand he did charge, but if this sort of thing goes in, I am forced to call in other people that he did charge, if I can find them, and that will drag the case on forever. We are only trying these two cases here" (R. 136).

(4) All the witnesses for the defense who were at the trial to testify on this question for petitioner were excused (R. 137) and their offered testimony was placed in the bill of exceptions by stipulation (R. 266-269).

(5) During the cross-examination of Mrs. Green, a witness for the defense, she was asked if she wasn't familiar with the fact that the petitioner "was charging people for getting allotments" and asked if when people inquired of her as to what the charge for allotments was, if she didn't tell them "that his usual charge was $25.00."

The witness emphatically answered in the negative (R. 155). The following question was then asked:

> "Q. Didn't Mrs. O. B. Skinner come to Mr. Polk's office in Franklin, Tennessee, and ask you what the usual charge was for filling out an allotment application, and you told her the usual charge was $25.00?
> A. No, sir, that is not so, she never came to the office and I didn't tell her any such thing."

Over the objection of petitioner, Mrs. O. B. Skinner was allowed to testify that petitioner had assisted her in making an application for an allotment and that he charged her $15.00 for his services. She introduced three receipts signed by Mrs. Green showing a payment by Mrs. Bessie Skinner (said however she was the same person as Mrs. O. B. Skinner), to petitioner of $5.00 each, and after the word "For" the following appeared on the receipts, "On Acct," "On Acct" and "Balance Due on Fee." When the District Attorney was attempting to show this witness was competent to contradict Mrs. Green this witness said, "She said (i. e., Mrs. Green) he had trouble with several of them and she said those he had trouble with he did charge $25.00." The petitioner again objected to this testimony and also called to the Court's attention the fact that when the District Attorney was attempting to lay ground for this testimony he asked Mrs. Green if she hadn't told Mrs. Skinner that "the defendant regularly charged $25.00." The objection was overruled. The District Attorney then offered the receipts as Government Exhibits. Objection was made and overruled and the Court stated: "Well, he made the statement here that he never charged anybody for having obtained allotments. I suppose that would be rebuttal of that" (R. 202-206).

Over the objection of the defendant, Mrs. Thelma Tomlin was permitted to testify that petitioner had assisted

her in making an application for an allotment and that he charged her $15.00 for his services. She had receipts signed by Mrs. Green, petitioner's secretary, one in the amount of $10.00 and the other in the amount of $5.00. Both receipts had written on them, after the word "For," the words "Services in Allotment" (R. 211-215).

Applying the above propositions of law to the facts of this case, we insist that it was error to permit such prejudicial evidence to be presented to the jury.

The trial judge was of the opinion that, because petitioner stated he hadn't charged anybody, that the Government could put on testimony of separate offenses that he had committed on other occasions to rebut petitioner (R. 206). The Government first brought up the question with the witness Thelma Deal, trying to establish before the jury that petitioner customarily charged one-third of the recovery for obtaining allotments. Surely petitioner had a right to deny such testimony, even if it was a collateral issue, without waiving his right to a fair trial. **If such a subterfuge could be used for the purpose of getting before the jury evidence of other crimes, the general rule relating to evidence of other crimes would be useless.** This question was squarely presented in the case of Weil v. U. S., supra, where the defendant was on trial for a conspiracy to possess intoxicating liquors for sale at the defendant's warehouse. The defendant was asked if, in the last three years, he had sold any whiskey. He answered, "I have not, sir, in my entire life." Testimony was then admitted showing that he had sold whiskey on occasions other than that for which he was on trial, and the court held that the rebuttal testimony was "a wholly collateral matter, and could not be used for the purpose of so impeaching the defendant," and also said it was prejudicial to the defendant, and reversed the case for admitting such testimony.

Relative to the testimony of Mrs. Tomlin, the Government made no pretense to lay ground for her testimony, and we think her testimony should not have been received, for the reasons pointed out above and hereinafter discussed.

The testimony of these two witnesses was presented at a time when the defendant had no opportunity to prove their falsity, was not at all prepared to testify fully about them, and had to rely upon what his files showed. Therefore, the defendant was highly prejudiced before the jury, because it appeared to them that he did not want to disclose all the facts (R. 228).

The record shows positively that **neither Mrs. Tomlin nor Mrs. Skinner ever made application for allotments.** The very testimony which caused the jury to return a verdict of guilty in this case, which should never have been admitted in the first instance, was positively shown to be false by the records of the Office of Dependency Benefits.

POINT D.

Testimony of Lizzie Griggs and Sixteen Other Witnesses Excluded by Trial Court (Question 5).

The defense offered Lizzie Griggs and sixteen other witnesses (Stipulation, R. 266-269) to rebut the testimony of the Government that the petitioner made it a custom to charge for obtaining allotments and other similar matters. The Government was permitted to use rebuttal witnesses to show that he committed other offenses of charging for obtaining allotments and the trial judge said he thought it was competent because "he (petitioner) made the statement here that he never charged anybody for having obtained allotments." "I suppose," said the trial judge, "it would be in rebuttal of that" (R. 206). It will be recalled that petitioner made this statement when answering a

question, to refute the testimony of Thelma Deal that he made a customary charge (R. 102).

If the evidence presented by the Government to show that petitioner customarily charged for obtaining allotments was admissible, then the evidence offered by petitioner to show that the petitioner did not customarily charge shoul have been admitted. On the contrary, if the evidence offered by petitioner with the sixteen witnesses was not admissible, then the trial court was in error for permitting the prejudicial testimony of Mrs. Tomlin and Mrs. Skinner to be submitted to the jury. Surely the trial judge has not the power to change the fundamental rules of evidence to the extent that only the Government can be heard, or to permit the Government to introduce prejudicial and damaging evidence without permitting the individual to raise his voice in protest or introduce proof to establish that such prejudicial evidence is false.

POINT E.

Denial of a New Trial on Newly Discovered Evidence (Question 6).

The ground for a new trial on newly discovered evidence is fully set out in Question 6, infra, pages 6-7, to which reference is here made.

Although a motion for a new trial on newly discovered evidence is addressed to the judicial discretion of the trial judge, and cannot be reversed unless the discretion is abused,

Ramsey v. U. S., 268 Fed. 825,

it is the duty of a trial court to grant a new trial where, by newly discovered evidence, it is shown that material testimony is false.

Martin v. U. S., 17 Fed. (2d) 973;
Pettine v. Territory of New Mexico, 201 Fed. 489.

During the trial, the only method the petitioner had to determine whether or not he had assisted Mrs. Skinner and Mrs. Tomlin in making applications for allotments was from his personal files and records. From these records petitioner was of the opinion that Mrs. Tomlin had made an application and that Mrs. Skinner had not made an application (R. 227). Therefore, the discovery made after the trial that neither had made an application was newly discovered evidence which was not merely cumulative. This evidence was material because it showed that these witnesses never had made application for allotments, **therefore, petition could not have charged them fees for that.** If this evidence is now to be considered as being immaterial, then it should not have been admitted in the first instance. **The very evidence which convinced the jury that petitioner was guilty is now shown to be false according to the Government's own records.**

Petitioner was also entitled to have been granted a new trial because of the testimony of Jasper King, husband of Ellen Beard King, which was that Ellen Beard King admitted to him after the trial that she had falsely testified against petitioner (Test. Jasper King, R. 296), and this evidence was corroborated by Noble King (Test. Noble King, R. 309).

CONCLUSION.

It is respectfully submitted that this case clearly illustrates the injustice of permitting a jury to consider evidence of crimes other than that for which a defendant is on trial, unless such evidence serves some other purpose than to indicate the defendant's evil propensity. Here the incompetent evidence was received in rebuttal, when the petitioner had no opportunity to prepare himself to meet it by the introduction of proof later shown in support of his motion for a new trial.

The Government had undertaken to show that the petitioner regularly charged illegal fees and two women had testified against him, from the nature of whose testimony it can hardly be contended that a conviction would have been obtained before a jury. In rebuttal two other women were introduced to contradict his statement that he had never charged anyone such fees as he was accused of taking. It is assumed that the Government now insists that since there was some competent evidence upon which a jury might have found the petitioner guilty, the testimony of these two women, shown on the motion for a new trial to be untrue, was not prejudicial to the petitioner. To this insistence it is believed that this Honorable Court may well answer in the language of a United States Court, speaking in the case of Coulston v. U. S., 51 F. (2d) 178:

> "To all of this the appellee answers that the jury convicted upon abundant evidence, and that the errors complained of were not prejudicial. The same contention was made to the Eighth Circuit Court of Appeals many years ago, and in response thereto that court (Sanborn, Van Devanter and Phillips sitting) said: 'The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestions is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight

of the prosecution which resulted in the verdict of guilty.' Miller v. Territory of Oklahoma, 149 F. 330, 339, 9 Ann. Cas. 389.

"The case will be reversed and remanded for a new trial. Reversed and remanded."

Even if petitioner had made a charge against Mrs. Tomlin and Mrs. Skinner for assisting them in making such an application as they said was made, the evidence was not competent; but the ironical feature in the record is that it later developed that neither of these witnesses ever made such an application at all, a fact shown by the Government's official records. The language of this Court in Boyd v. U. S., 142 U. S. 450, 35 L. Ed. 1077, seems particularly applicable here: Proof of the other offenses "only tended to prejudice the defendant with the jurors, to draw their minds away from the real issue, and to produce the impression that he was a wretch . . . who was not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crimes."

Respectfully submitted,

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Battle v. *United States*, 209 U. S. 36	10
Bird v. *United States*, 187 U. S. 118	10
Cornes, v. *United States*, 119 F. (2d) 127	11
Dowling Bros. Distilling Co. v. *United States*, 153 F. (2d) 353, certiorari denied, *sub nom. Gould* v. *United States*, 328 U. S. 848	12
Grace v. *United States*, 4 F. (2d) 658, certiorari denied, 268 U. S. 702	11
Hamburg-American Steam Packet Co. v. *United States*, 250 Fed. 747, certiorari denied, 246 U. S. 662	11
Hoffman v. *United States*, 68 F. (2d) 101	11
Moore v. *United States*, 150 U. S. 57	12
Morris v. *United States*, 123 F. (2d) 957	11
Powers v. *United States*, 223 U. S. 303	11
Seebach v. *United States*, 262 Fed. 885	12
Strom v. *United States*, 12 F. (2d) 233, certiorari denied, 271 U. S. 683	12
United Cigar Whelan Stores Corp. v. *United States*, 113 F. (2d) 340	12
United States v. *Montgomery*, 126 F. (2d) 151, certiorari denied, 316 U. S. 681	11
United States v. *Skidmore*, 123 F. (2d) 604, certiorari denied 315 U. S. 800	12
United States v. *Turley*, 135 F. (2d) 867, certiorari denied, *sub nom. Burns* v. *United States*, 320 U. S. 745	10

Statutes:

Servicemen's Dependents Allowance Act of 1942 (Act of June 23, 1942, c. 443, Title I, § 119, 56 Stat. 381, 385)	2, 3
Act of October 26, 1943, c. 281, § 11, 57 Stat. 577, 580, 37 U. S. C., Supp. V, 219	3

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 457

ROBERT H. POLK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was filed by the Circuit Court of Appeals, but its judgment (R. 327) recited that it appeared "that the verdict of the jury was sustained by the evidence, and that there was no error on the trial or in the proceedings before the district court."

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 27, 1947 (R. 327). The petition for a writ of certiorari was filed November 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's verdict that petitioner charged or received any money as compensation for assisting in obtaining family allowances under the Servicemen's Dependents Allowance Act.

2. Whether the trial judge erred in instructing the jury or in refusing petitioner's proffered instructions in respect of the above question.

3. Whether, after petitioner testified that as a matter of practice he did not charge for services under the Act, the trial court erred in admitting testimony of other persons who had been charged by petitioner for such services.

4. Whether the trial court erred in refusing petitioner's proffer of testimony by clients other than those referred to in the indictment that he had never charged them for services in obtaining allotments.

5. Whether the trial court erred in denying petitioner a new trial sought on the grounds of newly discovered evidence allegedly reflecting upon the credibility of government witnesses.

STATUTES INVOLVED

The Servicemen's Dependents Allowance Act of 1942, as originally enacted (Act of June 23, 1942, c. 443, Title I, § 119, 56 Stat. 381, 385), provided in pertinent part:

> No part of any amount paid pursuant to the provisions of this title shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with any family allowance payable under this title, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than $100 nor more than $1,000.

As amended, the foregoing statute provided in pertinent part (Act of October 26, 1943, c. 281, § 11, 57 Stat. 577, 580; 37 U. S. C., Supp. V, 219):

> Any person who shall, directly or indirectly, solicit, contract for, charge, or receive or shall attempt to solicit, contract for, charge, or receive any fee or compensation for assisting in any manner an enlisted man or dependent in obtaining a family allowance payable under this title, shall, upon conviction thereof, be guilty of a misdemeanor and for each and every offense shall be punishable by a fine of not less than $100 nor more than $1,000 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

STATEMENT

On August 14, 1945, an indictment in four counts was filed in the District Court for the

Middle District of Tennessee charging that petitioner, a practicing attorney of Williamson County, Tennessee, violated the Servicemen's Dependents Allowance Act of 1942 by charging or receiving certain sums of money for services in obtaining family allowances thereunder (R. 1–5). Counts 1 through 3, charging violations of the original act (*supra*, pp. 2–3), alleged that on January 5, April 29, and August 1 of 1943, petitioner received certain moneys from Dora Thelma Deal (count 1) and Ellen Beard King (counts 2 and 3) out of amounts paid to them under the Act and "on account of services rendered by him as agent or attorney in connection with the family allowance payable to" them under the Act as dependent wives of enlisted men in the Army (R. 2–3). Count 4, charging a violation under the amended statute of October 26, 1943 (*supra*, p. 3), alleged that on March 1, 1944, petitioner charged and received from Ellen Beard King a fee "for assisting her to obtain a family allowance" of the same character (R. 4).

After a jury trial, petitioner was found guilty on all four counts of the indictment (R. 14–15, 245–246). He was sentenced to pay a fine of $500 on each of the four counts and to imprisonment for one year on the fourth count (R. 15–16, 21–22, 264). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 327), without opinion.

The evidence in support of the conviction may be briefly summarized as follows:

The victim referred to in count 1, Thelma Deal, testified: As of 1943 she was married to one Elton Herman Deal, who was then serving in the Army of the United States (R. 36). In that year, with petitioner's advice and assistance, she applied for an allotment from the United States Government because of her husband's military service and when she asked petitioner how much he would charge for his services in connection with the application "he said he would be reasonable" but did not set any specific figure (R. 38). Subsequently when she received from the Government a $350 check dated January 30, 1943, she brought it to petitioner, as he had instructed her, and he cashed the check after she had endorsed it (R. 39). In response to her inquiry as to his fee, petitioner told her that "for all such matters he charged a third of what the check was" and he gave her $235 from the $350 check, keeping $115 for himself (R. 40).

The victim referred to in the remaining three counts, Ellen Beard King, testified: She was married to one Jasper King who was serving in the Army of the United States (R. 53–54). Petitioner advised and assisted her in obtaining necessary papers for an allotment and he filled them out and mailed them (R. 55–56). On a number of different occasions petitioner wrote her advising that there were checks for her at his office. Each time when she went to his office, he said there was a Government check for her, and he opened the letter, turned the check face down so

that she could not see it and had her endorse it. He then went out of his office and cashed the check and returned and gave her certain money. She received $40 on each of eight different visits in 1943 and $60 on each of three in 1944. Mrs. King identified indorsements on the back of eight Government checks in the amount of $62 each and dated the first days of April, and June through December 1943, and those on three Government checks in the amount of $80 each and dated the first days of January through March 1944, as her's and petitioner's. (R. 56–64.) During March 1944, she had discussed the amount of her allotment with people with whom she was living and someone went with her to see petitioner about the matter, but he was not in his office at the time. The next month (April 1944) petitioner mailed the allotment check to her which she cashed for the full face amount of $80. (R. 64–65.) One Rosalie Peach, a lifelong friend of the witness King (R. 90–91), testified that she accompanied Mrs. King on several occasions to petitioner's office and that when Mrs. King came out and counted the money she had only $40 (R. 91–92).

At the close of the Government's case in chief, petitioner took the stand and, after admitting that he had assisted the witnesses Deal and King in connection with their family allotments, he denied that he had said anything to Deal about charging for his services or that he had taken any compensation from either of these women for his services

or withheld any of the moneys from their allotment checks (R. 100-115). Petitioner also testified that it was not his custom to charge for such work and that he had handled dozens of such matters without any charge whatsoever (R. 102). Essentially the same assertions were made by petitioner's secretary testifying for the defense (R. 140–146). The defense also sought to call seventeen other witnesses for whom petitioner allegedly had prepared allotment papers to show he had not charged them for such services, but, on objection by the prosecutor, the proffer was refused by the trial court (R. 135–137, 266–269). In rebuttal the Government, over petitioner's objection, called Mrs. O. B. Skinner and Mrs. Thelma Tomlin. Mrs. Skinner, whom petitioner's secretary had testified she did not know (R. 156), testified that in December 1943, petitioner had assisted her in applying for an allotment and that he charged her $15 for this service which she paid to his secretary (R. 202–203). She identified in evidence three receipts for $5 each which were given her for these payments (R. 203–204, 206). Petitioner rendered no other services for Mrs. Skinner (R. 202). The witness also testified that petitioner's secretary told her that petitioner charged $25 for those allotment matters with which he had any trouble (R. 205). Mrs. Tomlin testified that in 1943 petitioner helped her get an allotment and filled out allotment papers for her, and that he charged her $15 for this service which

she paid to his secretary in two installments of $5 and $10. She also identified for introduction in evidence two receipts on petitioner's bill head, and signed by his secretary, reading, "For Services in Allotment" which she stated were given her for these two payments. (R. 212–214.)

Following his conviction, petitioner moved for a new trial (R. 16–21, 283–291) on the following principal grounds: (1) that the court had committed several errors, in the course of the trial (discussed in Argument, *infra,* points 1–4); (2) that he had discovered since his trial that the Government's rebuttal witnesses, Mrs. O. B. Skinner and Mrs. Tomlin, had never applied to the Government for family allotments, but that allotments for each of them had been applied for by their soldier husbands; and (3) that he had obtained evidence from the husband of the complaining witness, Ellen Beard King, showing that, subsequent to the trial, she had admitted she had testified falsely. After full hearing (R. 248–265, 294–321), these motions were denied (R. 21–22, 293).

ARGUMENT

1. Petitioner, conceding (Pet. 32) that there was substantial evidence to support his conviction on count 1 (based on his transactions with Dora Thelma Deal), contends that there was insufficient evidence to support the convictions on counts 2, 3, and 4 (based on his dealings with Ellen Beard King) (Pet. 2, 27, 31–36). He

argues that the evidence adduced by the Government shows at most that he was guilty of larceny by trick, embezzlement or fraudulent breach of trust in withholding from Mrs. King part of the money from her allotment checks, but that, since no fee or compensation agreement was made or discussed, the evidence does not show he charged or received any fee or compensation from her within the statutory proscription. We submit, however, that the mere statement of petitioner's argument demonstrates its weakness. The statute, both as originally enacted (counts 2 and 3) and as amended (count 4), prohibits, *inter alia,* the receipt of compensation on account of allotment services, and the amended statute reaches any such act done directly or *indirectly.* The fact that petitioner and Mrs. King may not have discussed fees, does not obviate the fact necessarily implicit in his dealings with her that he withheld and thus *received* moneys from her allotment checks on account of his services in connection therewith. Certainly, the evil legislated against is as pronounced whether a fee arrangement is expressed or implied. If, in fact, petitioner believed that the moneys were not withheld as compensation for his services in the allotment matter, but solely through larceny by trick, embezzlement or fraud, that was a matter of defense which should have been advanced by evidence at the trial to overcome the clear implication which the jury could, and necessarily did, draw to the contrary. However, as we have already shown

in the Statement, no such defense was made, petitioner having been satisfied to rely solely on his denial that he withheld any money. Finally, it should be noted that petitioner did not save any question as to the sufficiency of the evidence by moving for a directed verdict. (See Index to Record and R. 235, 245; Pet. 31.)

2. Petitioner next contends (Pet. 2–4, 29, 37–40) that the trial judge erroneously instructed the jury and refused proffered instructions in clarification so that (Pet. 39) "the jury was told [in effect] that it was its duty to return a verdict of guilty on the last three counts if they found that the defendant received any of the proceeds of Government checks to Ellen Beard King, whether he received it as a fee in another matter, or whether he obtained it as a result of larceny or embezzlement, or in any other manner."

For reasons similar to those advanced in point 1 above, this contention is likewise without merit, for petitioner's only evidentiary defense was that he had not withheld any money from Mrs. King's allotment checks. Consequently, even if, under the statute, it might be argued that withholding for other purposes or through larceny, embezzlement or fraud is a good *theoretical* defense, the evidence adduced presented no such *real* defense and the trial judge properly, therefore, refused to inject such an issue into his instructions to the jury. See, e. g., *Battle* v. *United States,* 209 U. S. 36, 38; *Bird* v. *United States,* 187 U. S. 118, 132–133; *United States* v. *Turley,* 135 F. (2d) 867,

869–870 (C. C. A. 2), certiorari denied, *sub nom. Burns* v. *United States,* 320 U. S. 745; *Grace* v. *United States,* 4 F. (2d) 658, 661–662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Hamburg-American Steam Packet Co.* v. *United States,* 250 Fed. 747, 765 (C. C. A. 2), certiorari denied, 246 U. S. 662.

3. Petitioner contends that it was error to admit the testimony of Mrs. Skinner and Mrs. Tomlin in rebuttal because evidence tending to show petitioner had committed other crimes wholly independent of that for which he was on trial is inadmissible (Pet. 4–5, 28, 29, 41–47).[1] However, while the general rule is as asserted by petitioner, the testimony in question was clearly admissible on two independent grounds. It was admissible as an exception to the rule because it showed the performance of acts by petitioner similar to those with which he was charged and, therefore, was fairly cognate to his intent in his relations with the victims referred to in the indictment. See, e. g., *Powers* v. *United States,* 223 U. S. 303, 315–316; *Morris* v. *United States,* 123

[1] In this connection, petitioner also contends that the order of proof thus allowed was improper. But the law is well settled that the order of reception of evidence is a matter addressed to the discretion of the trial court and that no grounds for reversal are presented by reason of the admission of evidence in rebuttal which could have been admitted in chief. *United States* v. *Montgomery,* 126 F. (2d) 151, 153 (C. C. A. 3), and cases cited, certiorari denied, 316 U. S. 681; *Cornes* v. *United States,* 119 F. (2d) 127, 130 (C. C. A. 9); *Hoffman* v. *United States,* 68 F. (2d) 101, 103 (C. C. A. 10).

F. (2d) 957, 959 (C. C. A. 5); *United Cigar Whelan Stores Corp.* v. *United States,* 113 F. (2d) 340, 347 (C. C. A. 9); *Seebach* v. *United States,* 262 Fed. 885, 887 (C. C. A. 8). It was also admissible to rebut the testimony of petitioner and his secretary that it was not his custom to charge for services in securing allotments and to reflect upon their credibility. See, e. g., *Seebach* v. *United States,* 262 Fed. 885 (C. C. A. 8); *Strom* v. *United States,* 12 F. (2d) 233, 234 (C. C. A. 6), certiorari denied, 271 U. S. 683; *United States* v. *Skidmore,* 123 F. (2d) 604, 610 (C. C. A. 7), certiorari denied, 315 U. S. 800; *Dowling Bros. Distilling Co.* v. *United States,* 153 F. (2d) 353, 361 (C. C. A. 6), certiorari denied, *sub nom. Gould* v. *United States,* 328 U. S. 848. Moreover, since petitioner himself first opened up the question as to his custom in such matters, he cannot now be heard to complain that the Government's evidence in rebuttal was collateral, particularly since the rebuttal testimony could have been offered in chief on the issue of intent. It is clear, therefore, that since the rebuttal evidence was competent, it was not rendered inadmissible merely because it tended to show that defendant was guilty of other offenses than those charged. *Moore* v. *United States,* 150 U. S. 57; *Dowling Bros. Distilling Co.* v. *United States, supra.*

4. Petitioner's contention that the trial court erred in refusing his proffer of testimony by other persons whom he had assisted in obtaining allotments to the effect that he had not charged them

for such services (Pet. 5, 28, 29, 47–48), is also without merit, for, as the prosecutor pointed out in objecting to the admission of that testimony (R. 136), the mere fact that in some instances it might be shown petitioner made no charge for his services, laid no basis for any inference as to what he did in others, and consequently the evidence lacked probative value to make it material.

5. Finally, petitioner contends that he was entitled to a new trial on the basis of newly discovered evidence that the Government's rebuttal witnesses, Skinner and Tomlin, had not applied for allotments and that the complaining witness, King, had falsely testified (Pet. 5–7, 28, 30, 48–49). We submit, however, that in the circumstances here it cannot be said that the trial judge abused his discretion in denying the motion for a new trial. The only pertinent evidence offered by the motion in support of the allegations as to Skinner and Tomlin were letters from certain Army officials that these persons had never applied for family allotments and that the allotments were applied for by their husbands. But that evidence would not have proved that petitioner had not done some work for either of the wives in connection with the applications by their husbands or in preparing necessary supporting documents (see, e. g., R. 225, 227). Additionally, the absence of any denial by petitioner as to dealings with these women in connection with family allotments is apparent. As to the question of alleged perjury by the complaining witness, King, we find

nothing in the record to overcome the statement of the trial judge, in his order denying the motion (R. 293):

> In support of the motions, the Court heard the testimony of Jasper King and Noble King. Ellen Beard King testified for the Government. The Court was not favorably impressed with the testimony of Jasper King and Noble King or their appearance on the witness stand. On the other hand, the said Ellen King testified in the same straightforward manner as she had done in the previous trials of this case, and her testimony was not in any manner impeached or shaken by cross-examination.
>
> Having heard the witnesses, the Court is of the opinion that said Ellen King is entitled to more credibility than either of the two witnesses Jasper or Noble King.

CONCLUSION

The conviction and judgment below are clearly correct and the petition for a writ of certiorari presents no substantial question in respect thereof. We respectfully submit, therefore, that the petition should be denied.

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